



FEDERAL ELECTION COMMISSION  
WASHINGTON, D.C. 20463

**By Electronic Mail and First Class Mail**

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**JAN 16 2013**

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150 Post Street, Suite 405  
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RE: MUR 6715  
The Legacy Committee Political Action  
Committee and James Lacy in his official  
capacity as treasurer

Dear Mr. Hertz:

On August 27, 2012, the Federal Election Commission (the "Commission") notified your clients, The Legacy Committee Political Action Committee and James Lacy in his official capacity as treasurer (the "Committee"), of AR 12-07 indicating that, in the normal course of carrying out its supervisory responsibilities, the Commission became aware of information suggesting that the Committee may have violated the Federal Election Campaign Act of 1971, as amended (the "Act"). On January 8, 2013, the Commission opened MUR 6715 and found reason to believe that the Committee violated 2 U.S.C. § 434(b)(6)(B)(iii) and (g) and 11 C.F.R. § 104.4(a), (b) and (c), provisions of the Act and the Commission's regulations. Enclosed is the Factual and Legal Analysis that sets forth the basis for the Commission's determination.

Please note that your clients have a legal obligation to preserve all documents, records and materials relating to this matter until such time as you are notified that the Commission has closed its file in this matter. See 18 U.S.C. § 1519. In the meantime, this matter will remain confidential in accordance with 2 U.S.C. § 437g(a)(4)(B) and 437g(a)(12)(A), unless you notify the Commission in writing that you wish the investigation to be made public.

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We look forward to your response.

On behalf of the Commission,

A handwritten signature in black ink, appearing to read 'DMG II', written in a cursive style.

Donald F. McGahn II  
Vice Chair

Enclosures  
Factual and Legal Analysis

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1 **BEFORE THE FEDERAL ELECTION COMMISSION**

2 **FACTUAL AND LEGAL ANALYSIS**

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4  
5 **RESPONDENTS:** The Legacy Committee Political Action Committee **MUR: 6715**  
6 and James Lacy in his official capacity as treasurer  
7

8 **I. INTRODUCTION**

9 This matter was generated based on information ascertained by the Federal Election  
10 Commission ("Commission") in the normal course of carrying out its supervisory  
11 responsibilities. See 2 U.S.C. § 437g(a)(2). The Commission's Audit Division referred this  
12 matter to the Office of General Counsel following the Commission's approval of the Final Audit  
13 Report ("FAR") for the audit of The Legacy Committee Political Action Committee ("LCPAC")  
14 covering the period from January 1, 2007 through December 31, 2008. See 2 U.S.C. § 438(b).  
15 The FAR, approved by the Commission on July 31, 2012, contained a finding (Finding 2) that  
16 LCPAC failed to timely file 24- and 48-hour notices of independent expenditures and failed to  
17 properly disclose independent expenditures on Schedule E of its reports filed with the  
18 Commission. See Attached FAR Finding 2.<sup>1</sup> On the basis of the FAR, the Commission finds  
19 reason to believe that LCPAC and James Lacy in his official capacity as treasurer  
20 ("Respondents") violated 2 U.S.C. § 434(b)(6)(B)(iii) and (g) and 11 C.F.R. § 104.4(a), (b)  
21 and (c).

22 **II. FACTUAL AND LEGAL ANALYSIS**

23 **A. Facts**

24 LCPAC is a multi-candidate committee that has been filing reports with the Commission  
25 since December 2006. Pursuant to 2 U.S.C. § 438(b), the Commission authorized an audit of

<sup>1</sup> The entire FAR is available on the Commission's website. See *Audit Report – The Legacy Committee Political Action Committee*, [http://www.fec.gov/audits/2008/The\\_Legacy\\_Committee\\_Political\\_Action\\_Committee/FinalAuditReportoftheCommission1223257.pdf](http://www.fec.gov/audits/2008/The_Legacy_Committee_Political_Action_Committee/FinalAuditReportoftheCommission1223257.pdf).

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1 LCPAC's activity during the period from January 1, 2007 through December 31, 2008. During  
2 the audit, the Commission examined whether LCPAC properly reported its expenditures,  
3 including those made in connection with 60 separate direct mail fundraising appeals, a number of  
4 which included express advocacy. LCPAC originally reported these expenditures as operating  
5 expenditures. After discussions with the Commission's Reports Analysis Division, LCPAC  
6 disclosed over \$1 million in independent expenditures on Schedule E of its amended reports and  
7 filed, belatedly, most of the 24- and 48-hour notices where such notices would have been  
8 required. *See* Attachment at 2. The Audit Division determined that some, but not all, of the  
9 fundraising letters disclosed as independent expenditures in LCPAC's amended reports  
10 contained express advocacy and should have been timely disclosed through 24- and 48-hour  
11 notices. *Id.* at 2-3.

12 During the audit process, Respondents asserted that the purpose of their direct mail letters  
13 was fundraising, not supporting or opposing candidates in elections, and that as a result their  
14 spending did not require reporting as independent expenditures. *Id.* at 1, 3-4. Rejecting this  
15 position, in part, on July 31, 2012, the Commission approved an audit finding that LCPAC did  
16 not timely file 24- and 48-hour notices for independent expenditures totaling \$281,439, did not  
17 file 24-hour notices for independent expenditures totaling \$17,571, and did not properly disclose  
18 independent expenditures totaling \$123,326 prior to payment as memo entries on Schedule E and  
19 as reportable debts on Schedule D (Debts and Obligations).<sup>2</sup> *See* Attachment at 1, 4.

<sup>2</sup> On June 7, 2012, the Commission considered but failed by a vote of 3-3 to approve an audit finding that LCPAC did not timely file 24- and 48-hour notices for independent expenditures totaling \$374,327, did not file 24-hour notices for independent expenditures totaling \$17,571, and did not properly disclose independent expenditures totaling \$293,575 prior to payment as memo entries on Schedule E and as reportable debts on Schedule D (Debts and Obligations). *See* Attachment at 4; Commission Certification for A09-22 (The Legacy Committee Political Action Committee) (June 11, 2012).

1           The Audit Division referred this matter to the Office of General Counsel on August 15,  
2   2012. On August 27, 2012, the Commission notified Respondents of the referral in accordance  
3   with the Commission's policy regarding notification in non-complaint generated matters.  
4   74 Fed. Reg. 38617 (Aug. 4, 2009). Respondents responded to the Commission's notification on  
5   November 15, 2012, reiterating their position that the communications were intended to raise  
6   funds, and not to "persuade the voters to vote in a primary or general election during the period  
7   involved." Response at 1.

8           **B.     Legal Analysis**

9           The Federal Election Campaign Act of 1971, as amended, (the "Act") defines  
10   "independent expenditure" as an expenditure by a person expressly advocating the election or  
11   defeat of a clearly identified federal candidate that is not made in concert or cooperation with or  
12   at the request or suggestion of such candidate, the candidate's authorized political committee, or  
13   their agents, or a political party committee or its agents. 2 U.S.C. § 431(17). Under the  
14   Commission's regulations at 11 C.F.R. § 100.22(a), express advocacy includes phrases such as  
15   "vote for the President" or "defeat" accompanied by a picture of one or more candidates. It also  
16   includes campaign slogans or individual words, "which in context can have no other reasonable  
17   meaning than to urge the election or defeat of one or more clearly identified candidate(s)." *Id.*  
18   *see also* 11 C.F.R. § 100.22(b).

19          Every political committee that makes independent expenditures must report those  
20   expenditures in its regularly scheduled disclosure reports in accordance with 11 C.F.R.  
21   § 104.3(b)(3)(vii). 11 C.F.R. § 104.4(a). Such a political committee must disclose on  
22   Schedule E the name of a person who receives any disbursement during the reporting period in  
23   an aggregate amount or value in excess of \$200 within the calendar year in connection with an

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1 independent expenditure by the reporting committee. The report also must disclose the date,  
2 amount, and purpose of any such independent expenditure and include a statement that indicates  
3 whether such independent expenditure is in support of or in opposition to a candidate, as well as  
4 the name and office sought by such candidate. 2 U.S.C. § 434(b)(6)(B)(iii); 11 C.F.R.  
5 §§ 104.3(b)(3)(vii), 104.4(a). Independent expenditures of \$200 or less do not need to be  
6 itemized, though the committee must report the total of those expenditures on line (b) of  
7 Schedule E. *Id.* Further, a debt or obligation over \$500 must be reported as of the date on which  
8 the debt or obligation is incurred. 11 C.F.R. § 104.11(b). Independent expenditures made (*i.e.*,  
9 publicly disseminated) prior to payment should be disclosed as memo entries on Schedule E and  
10 as reportable debt on Schedule D (Debts and Obligations). Committees are required to maintain  
11 records that provide information with sufficient detail so that the reports may be verified.  
12 11 C.F.R. § 104.14(b)(1).

13 Under certain circumstances, independent expenditures made by a political committee  
14 require additional immediate disclosure prior to disclosure on the committee's regularly  
15 scheduled disclosure reports. A political committee that makes or contracts to make independent  
16 expenditures aggregating \$10,000 or more in connection with a given election at any time during  
17 a calendar year up to and including the 20th day before the date of an election is required to file a  
18 report describing the expenditures within 48 hours. 2 U.S.C. § 434(g)(2)(A); 11 C.F.R.  
19 § 104.4(b)(2). These reports, known as 48-hour notices, must be filed by the end of the second  
20 day "following the date on which a communication that constitutes an independent expenditure  
21 is publicly distributed or otherwise publicly disseminated." 11 C.F.R. § 104.4(b)(2). A  
22 committee is required to file additional reports within 48 hours after each time it makes or

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1 contracts to make independent expenditures aggregating an additional \$10,000. 2 U.S.C.  
2 § 434(g)(2)(B); 11 C.F.R. § 104.4(b)(2).

3 A political committee that makes or contracts to make independent expenditures  
4 aggregating \$1,000 or more in connection with a given election after the 20th day but more than  
5 24 hours before the date of an election is required to file a report describing the expenditures  
6 within 24 hours. 2 U.S.C. § 434(g)(1)(A); 11 C.F.R. § 104.4(c). These reports, known as 24-  
7 hour notices, must be filed within 24 hours "following the date on which a communication that  
8 constitutes an independent expenditure is publicly distributed or otherwise publicly  
9 disseminated." 11 C.F.R. § 104.4(c). A political committee must file additional reports within  
10 24 hours after each time it makes or contracts to make independent expenditures aggregating an  
11 additional \$1,000. 2 U.S.C. § 434(g)(1)(B); 11 C.F.R. § 104.4(c).

12 As set forth in the FAR, *see* Attachment at 4, LCPAC failed to file timely 24- and 48-  
13 hour notices for independent expenditures totaling \$281,439 and failed to file 24-hour notices for  
14 independent expenditures totaling \$17,571, as required by 2 U.S.C. § 434(g) and 11 C.F.R.  
15 § 104.4(b) and (c), and did not properly disclose independent expenditures totaling \$123,326  
16 prior to payment as memo entries on Schedule E and as reportable debts on Schedule D (Debts  
17 and Obligations), as required by 2 U.S.C. § 434(b)(6)(B)(iii) and 11 C.F.R. § 104.4(a).<sup>3</sup>

18 Based on the foregoing, the Commission finds reason to believe that Respondents  
19 violated 2 U.S.C. § 434(b)(6)(B)(iii) and (g) and 11 C.F.R. § 104.4(a), (b) and (c).

<sup>3</sup> As noted, Respondents asserted during the audit process that the purpose of their direct mail letters was fundraising, not intervening in elections, and that their spending did not require reporting as independent expenditures. The Commission, however, has determined that LCPAC's communications comprising the amounts set forth here constitute express advocacy and thus required reporting as independent expenditures.

## **Finding 2. Failure to File Notices and Properly Disclose Independent Expenditures**

### **Summary**

LCP disclosed independent expenditures totaling \$1,159,647 on Schedule E (Itemized Independent Expenditures). During audit fieldwork, the Audit staff noted that only \$412,891 of these expenditures appeared to meet the definition of independent expenditures and contained language expressly advocating the election or defeat of a clearly identified candidate. Of these independent expenditures (\$412,891):

- LCP did not file 24/48-hour notices for \$374,327 in a timely manner and did not file any 24-hour notices for \$17,571; and
- LCP did not properly disclose independent expenditures totaling \$223,575 made (i.e., publicly disseminated) prior to payment as "memo" entries on Schedule E and as a reportable debt on Schedule D (Debts and Obligations).

In response, LCP provided information supporting its position that the purpose of its direct-mail letters was fundraising and that they did not require reporting as independent expenditures. Regarding the Audit staff's recommendation that it submit and implement revised procedures for reporting independent expenditures, LCP indicated that it plans to terminate after the audit is completed.

The Commission approved the finding that, for specific communications, LCP failed to file notices and properly disclose independent expenditures. The Commission agreed that of the \$412,891 in expenditures that the Audit staff identified, \$310,090 should have been reported as independent expenditures. Therefore, the Commission approved a finding that LCP did not timely file 24/48-hour notices of \$281,439, did not file 24-hour notices for \$17,571, and did not properly disclose independent expenditures totaling \$123,326 prior to payment as "memo" entries.

### **Legal Standard**

**A. Definition of Independent Expenditures.** The term "independent expenditure" means an expenditure by a person for a communication expressly advocating the election or defeat of a clearly identified candidate that is not made in coordination with any candidate or authorized committee or agent of a candidate. 11 CFR §100.16.

**B. Disclosure Requirements – General Guidelines.** An independent expenditure shall be reported on Schedule E if, when added to other independent expenditures made to the same payee during the same calendar year, it exceeds \$200. Independent expenditures made (i.e., publicly disseminated) prior to payment should be disclosed as "memo" entries on Schedule E and as a reportable debt on Schedule D. Independent expenditures of \$200 or less do not need to be itemized, though the committee must report the total of those expenditures on Line (b) on Schedule E. 11 CFR §§104.3(b)(3)(vii), 104.4(a) and 104.11.

**C. Last-Minute Independent Expenditure Reports (24-Hour Notices).** Any independent expenditures aggregating \$1,000 or more, with respect to any given election,

Att. to FLA  
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and made after the 20<sup>th</sup> day but more than 24 hours before the day of an election must be reported and the report must be received by the Commission within 24 hours after the expenditure is made. A 24-hour notice is required each time additional independent expenditures aggregate \$1,000 or more. The date that a communication is publicly disseminated serves as the date that the committee must use to determine whether the total amount of independent expenditures has, in the aggregate, reached or exceeded the threshold reporting amount of \$1,000. 11 CFR §§104.4(f) and 104.5(g)(2).

**D. Independent Expenditure Reports (48-Hour Notices).** Any independent expenditure aggregating \$10,000 or more with respect to any given election, at any time during a calendar year, up to and including the 20th day before an election, must be disclosed within 48 hours each time the expenditures aggregate \$10,000 or more. The notices must be filed with the Commission within 48 hours after the expenditure is made. 11 CFR §§104.4(f) and 104.5(g)(1).

## **Facts and Analysis**

### **A. Facts**

Initially, LCP disclosed all expenditures as operating expenditures (Schedule B, Line 21(b)). During 2008, LCP received notices from the Commission's Reports Analysis Division (RAD) questioning whether any of the expenditures, e.g., "Printing," were for public communications containing express advocacy. LCP's Treasurer acknowledged that some of the communications contained express advocacy but contended that the purpose of the communication was fundraising. RAD advised LCP that if the communication contained express advocacy, LCP should amend its reports to disclose the expenditures as independent expenditures. Subsequently, LCP filed the requested amended reports.

LCP disclosed independent expenditures totaling \$1,159,647 on Schedule E. During fieldwork, Audit staff noted that most of these disbursements were for the printing and postage of direct mail solicitation letters and were disclosed as either in support of John McCain for President or in opposition to Hillary Clinton or Barack Obama for President. The Audit staff reviewed these expenditures to determine whether LCP reported them properly on Schedule E and filed the required 24/48-hour notices. Audit staff noted that only \$412,891 of these expenditures appeared to meet the definition of an independent expenditure and contained language expressly advocating the election or defeat of a clearly identified candidate. A review of the direct mail pieces and invoices for those expenditures (\$412,891) revealed the following:

- LCP did not timely file 24/48-hour notices of its independent expenditures for \$374,327. In addition, LCP did not file any 24-hour notices for \$17,571 of these expenditures.
- LCP reported the independent expenditures when the invoices were paid. However, most of these payments were weeks or months after the dissemination date of the printed material. For expenditures totaling \$293,575, LCP should have disclosed independent expenditures as memo entries on Schedule E, filed

with reports covering the dates when the materials were disseminated, and included a corresponding debt on Schedule D.

#### **B. Interim Audit Report & Audit Division Recommendation**

The Audit staff addressed these matters at the exit conference and provided appropriate schedules to LCP representatives. The Audit staff indicated that, at this time, no amended reports were necessary to correct the reporting of the independent expenditures or to address the 24/48-hour notices that were not filed or not filed timely. LCP representatives stated that they would review these schedules.

The Audit staff recommended that LCP take the following action:

- Provide any documentary evidence that would demonstrate that these disbursements were not independent expenditures and therefore did not require 24/48-hour notices; and
- Submit and implement revised procedures for reporting independent expenditures, as well as for tracking dissemination dates for such expenditures, in order to allow for timely filing of 24/48-hour reporting notices.

#### **C. Committee Response to Interim Audit Report**

In response to the Interim Audit Report, LCP offered background information for why it was created and the purpose of its direct-mail fundraising letters. LCP explained that it was formed in 2007 as a non-connected Political Action Committee (PAC) that was not supported by any sponsoring organization such as a labor union or corporation. There was no permanent staff, office or office equipment. It was formed with the intention of raising funds to allow it to participate in the 2008 general election by making direct contributions to candidates for federal office. LCP indicated that the committee was the epitome of a "grass roots" attempt to participate in the 2008 Federal elections.

LCP explained that its direct-mail advisors obtained lists of proven donors to Republican and conservative causes and tested various content appeals in the letters to these donors. The various tests included content with references to elected officials and presidential candidates to clue the recipient audience that LCP was a conservative Republican PAC worthy of their support. LCP stated that the purpose of these mailings was not to intervene in any election. LCP indicated that the facts demonstrated that: the *timing* of all of its mailings had no reference to the timing of primary elections during 2008; the *content* of the letters, other than sometimes including some words considered "express advocacy" by the Commission, did not urge the recipient audience to vote for any particular candidate; and the *audience* was selected for its fundraising value, with no consideration for its electoral value. Thus the expenditures' content, timing and distribution, and audience served a fundraising purpose but not an electoral purpose.

LCP stated that it disagreed that any of its direct-mail fundraising letters constituted independent expenditures. LCP noted that the Commission defines an independent expenditure at 11 CFR §100.16 as a communication expressly advocating the election or defeat of a clearly identified candidate. LCP acknowledged that some of its mailings did include words of express advocacy. However, LCP thought that if the Commission

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considered all of the facts, it should agree that LCP's fundraising letters were not independent expenditures and that the special reporting rules applicable to independent expenditures (such as the 24/48-hour notices or memo entries) should not apply. LCP stated its belief that direct-mail fundraising letters should be excluded from the definition of independent expenditures, and that the intent of the regulation was not to include direct mail fundraising expenditures as independent expenditures. LCP urged the Commission to reform its reporting requirements for grass-roots organizations that engage in direct-mail fundraising since it believes that these letters are not independent expenditures. LCP indicated that it had decided that the time requirements, coordination and record keeping are not worth the effort of continuing to participate and as such, plan to terminate the committee after the audit is completed.

The Audit staff does not dispute that LCP's intention was to raise funds via the direct-mail letters. However, LCP acknowledges, and the Audit staff agrees, that some of these letters included express advocacy language such as "Vote for John McCain". Since these expenditures meet the definition of an independent expenditure and the regulation does not exclude direct-mail fundraising letters from the definition, the Audit staff believes that the documentary evidence provided does not support LCP's assertion that none of these expenditures are independent expenditures.

#### **D. Draft Final Audit Report**

The Draft Final Audit Report concluded that LCP failed to file notices and properly disclose independent expenditures. LCP's response to the Draft Final Audit report did not address this matter.

#### **Commission Conclusion**

On June 7, 2012, the Commission considered the Audit Division Recommendation Memorandum in which the Audit Division recommended that the Commission adopt a finding that LCP did not timely file 24/48-hour notices of \$374,327 and did not file 24-hour notices for \$17,571<sup>1</sup> and did not properly disclose independent expenditures totaling \$293,575 prior to payment as "memo" entries.

The Commission approved this finding with respect to specific communications. (See Additional Issue below). The Commission agreed that of the \$412,891 in expenditures that the Audit staff identified \$310,090 should have been reported as independent expenditures. Therefore, the Commission approved a finding that LCP did not timely file 24/48-hour notices of \$281,439 and did not file 24-hour notices for \$17,571 and did not properly disclose independent expenditures totaling \$123,326 prior to payment as "memo" entries.

<sup>1</sup> Due to a typographical error in the Audit Division Recommendation Memorandum, the amount was improperly presented as \$17,491.